NO. 88-1310

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM 1989

CALVIN BRENT, PETITIONER

VERSUS

NATIONAL RAILROAD PASSENGER CORPORATION
d/b/a
AMTRACK AND BOH BROTHERS CONSTRUCTION
COMPANY, INC

ON PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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54 pp

QUESTIONS PRESENTED FOR REVIEW

(1) The defendant railroad, Amtrack, moved for a directed verdict at the end of the plaintiff's case on the issue of its FELA negligence. The trial court granted this motion. The jury was instucted on the traditional proximate cause causation standard. This required the jury to find that plaintiff's accident and injury were "substantially" connected. The jury was not instructed on the reduced FELA causation standard. As a result it was not allowed to connect up under this reduced standard of causation the FELA negligence of his employer with his extensive injuries. Hence the jury awarded the plaintiff a reduced verdict. The court of appeals reversed the trial court but held that this error did not require a new trial since the plaintiff received a money verdict against another defendant, Boh Brothers. Because plaintiff's burden on the issue of causation is signifcantly reduced in a FELA case

does he have a right to a new trial on the issue of causation?

(2)The trial judge and defense counsel told the plaintiff during trial that the doctor who was to connect up the accident with the plaintiff's signicant injuries was in jail and charged with murder for operating on and killing a patient while the doctor was intoxicated. This was false. However when the plaintiff attempted to use the deposition of the doctor the court ruled that it could only be used if the plaintiff would also agree to a stipulation to be read to the jury by the court which seriouly questioned the doctor's credibililty indicating that he had been suspened from the practice of medicine. Was this error and did it so affect the verdict of the jury on the issue of causation (which was the central issue in this case) so as to violate the plaintiff's right to a jury trial under FELA and the Seventh Amendment?

LIST OF INTERESTED PARTIES

The undersigned counsel of record for the plaintiff-appellant certifies that the following listed parties and organizations have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications for recusal.

1. CALVIN BRENT (PLAINTIFF PETITIONER)
2. NATIONAL RAILROAD PASSENGER CORPORATION d/b/a AMTRACK (DEFENDANT-RESPONDENT)
3. BOH BROTHERS CONSTRUCTION COMPANY, INC. (DEFENDANT-RESPONDENT)
4. ALLEN J. BORNE AND WALTER J. SENETTE,JR. ATTORNEYS FOR THE PETITIONER (BORNE, SENETTE AND DUPLANTIS)

5. BIENVENU, FOSTER, RYAN & O'BANNON
H. F. FOSTER, III ATTORNEYS FOR THE
DEFENDANT-RESPONENT BOH BROTHERS
CONSTRUCTION COMPANY, INC.
6.LEMLE, KELLEHER, KOHLMEYER, DENNERY,
MOSS & FRILOT ALBERT H. HANEMANN, JR.
ATTORNEYS FOR THE DEFENDANT-RESPONDENT -
AMTRACK

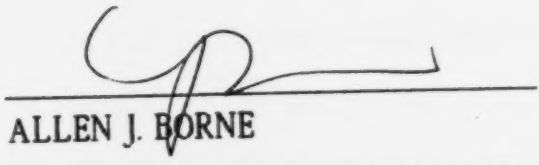

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TABLE OF AUTHORTIES

FELA (Federal Employers' Liability Act) 45 USC Section 51

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Coray v. Southern Pacific Co , 335 U.S. 520, 93 L.Ed 208. 69 S.Ct. 275 (1949)

Rogers v. Missouri Pacific R. Co 352 U.S. 500, 524, 559, 77 S.Ct. 443, 459, 478, 1 L.Ed.2d 493, 515, reh den 353 U.S. 943, 77 S.Ct. 808, 1 L.Ed. 2Ed 764 (1975)

98 American Law Reports, Annotated pp. 639 to 683.

Tennant v. Peoria & P. U. R. Co. 321 US 29, 88 L ed 520, 64 S Ct 409 (1943)

Lavender v. Kurn, 327 US 645, 90 L ed 916, 66 S Ct 7 (1946)

Ferguson v. Moore-McCormack Lines,325 US 521, 1 L ed 511, 77 S Ct 457,(1957)

Boeing Company v. Shipman 411 F.2d 365, 5th Cir. (1969)

Rice v. Glad, 750 F. 2nd 434, (5th Cir. 1985)

Donovan v. Hamm's, 661 F. 2nd 316, 317, (5th Cir. 1981)

Boeing Company v. Shipman 411 F.2d 365. (5th Cir. 1969)

Shows V. M/V Red Eagle, 695 F.2d 114. at 119 (5th Cir. 1983)

Kotteakos v. United States, 328 U.S. 750. at 765, 66 S.Ct. 1239. at 1248. 90 L.Ed. 1557 (1946)

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IN THE

SUPREME COURT OF THE UNITED STATES

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CALVIN BRENT, PETITIONER

VERSUS

NATIONAL RAILROAD PASSENGER CORPORATION

d/b/a

AMTRACK AND BOH BROTHERS CONSTRUCTION

COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on September 29, 1988 with rehearing denied October 31, 1988.

OPINION BELOW: Calvin Brent v. National Railroad Passenger Corp. . d/b/a Amtrack etal, No.s 86-3876 and 86-3887 consolidated decided September 29, 1988 Fifth Circuit Court of Appeals (1988) (unpublished see appendix A for a copy of the decision.)

JURISDICTION: The judgement of the Court of Appeals was entered on September 29, 1988 with a rehearing denied on October 31, 1988. The jurisdiction of the court is invoked under 28 U.S.C. Section 1254 (1).

THE QUESTIONS PRESENTED:

(1) The defendant railroad, Amtrack, moved for a directed verdict at the end of the plaintiff's case on the issue of its FELA negligence. The trial court granted this motion. The jury was instucted on the traditional proximate cause causation standard. This required the jury to find that plaintiff's accident and injury were "substantially" connected. The jury was not instructed on the

reduced FELA causation standard. As a result it was not allowed to connect up under this reduced standard of causation the FELA negligence of his employer with his extensive injuries. Hence the jury awarded the plaintiff a reduced verdict. The court of appeals reversed the trial court but held that this error did not require a new trial since the plaintiff received a money verdict against another defendant, Boh Brothers. Because plaintiff's burden on the issue of causation is significantly reduced in a FELA case does he have a right to a new trial on the issue of causation?

(2)The trial judge and defense counsel told the plaintiff at trial that the doctor who was to connect up the accident with the plaintiff's significant injuries was in jail and charged with murder for operating on and killing a patient while the doctor was intoxicated. This was false. However when the plaintiff attempted to use the deposition of the doctor the court ruled that it could only be used if the plaintiff would also agree to a

stipulation to be read to the jury by the court which seriously questioned the doctor s credibility and indicated that he had been suspend from the practice of medicine.Was this error and did it so affect the verdict of the jury on the issue of causation (which was the central issue in this case) so as to violate the plaintiff's right to a jury trial under FELA and the Seventh Amendment?

STATEMENT: This is a FELA-Louisiana[1] negligence law suit involving the collision of a crane and an Amtrack train. The City of New

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[1] The FELA (Federal Employers' Liability Act) 45 USC section 51 and Louisiana Civil Code Article 2315 formed the basis of plaintiff s cause of action. Section 51 of FELA provides:

> "Ever common carrier by railroad while engaging in commerce ... shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce...for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Orleans." The plaintiff was injured when the train he was employed on hit a crane as it passed through a construction site in New Orleans. The plaintiff filed suit in the Eastern District, State of Louisiana and sued his FELA employer, National Railroad Passenger Corporation d/b/a AMTRACK, and BOH Brothers Construction CO., Inc., the owner of the crane at the construction site.

Amtrack moved for a directed verdict at the close of the plaintiff's case. Over the objection of both the plaintiff and Boh Brothers the trial court granted the motion. The case went to the jury on the issue of Boh Brothers' La. Civil Code 2315 negligence. The jury returned a verdict for the plaintiff finding negligence on the part of Boh Brothers and awarded the plaintiff $41,000.00. The jury found the plaintiff not negligent.

The plaintiff filed a motion for a JNOV and new trial. The court denied both of these motions. On appeal the Fifth Circuit reversed the trial court's granting of the motion for a directed verdict as to

Amtrack but held that a new trial was not required since the plaintiff had recoved damages from Boh Brothers.

REASONS FOR GRANTING THE WRIT:

It is a basic and fundamental principle of American Justice that cases be fairly decided in accordance with due process. Both the Seventh Amendment and FELA give an injured railroad worker who has no workers compensation remedy the right to a jury trial on both the negligence of his FELA employer as well as causation. In addition, FELA also requires proof of only slight negligence and slight causation. The reason a FELA worker has no compensation remedy is found in the history of the act. It was enacted some years ago before workmen compensation became almost universal. An examination of the congressional intent behind the act shows that Congress was very concerned with the large number of injuries of railroad workers. As a result the act Congress eliminated two of the traditional common law defenses to

negligence actions. One of these was proximate cause.

Initially the act did protect the railroad worker. It gave him an advantage over workers in other industry. But now time has passed and the great majority of workers in the United States are covered by some form of workers compensation which does not require proof of employer negligence or fault. These compensation systems have also adopted a reduced standard of causation.

The railroad worker on the other hand is still required to prove negligence. Often this attempt to prove fault or negligence results in a trial court assuming that the standard for causation is the old common law "proximate cause" standard. This confusion of the two separate concepts of negligence and causation does not present a problem when "proximate cause" is defined in FELA causation language. On the other hand, when the definition given to "proximate cause" is the old common law definition which requires

substantial causation error results and the injured worker is denied FELA damages. Since there is no compensation scheme for a railroad worker other than FELA this results in an injured worker who gets no compensation at all. As a result the burden of this injured worker falls not on the railroad industry which benefited from his services but on some other part of government such as the social security system which is short of funds.

Although a number of railroad workers seriously injured are awarded large verdicts an equally large number of railroad workers are who are also injured receive no compensation due to the mistaken application of "proximate cause" by trial courts to trials involving FELA claims.

An examination of the jurisprudence of this court reveals no recent case which treats this issue of causation in a FELA case.The lower courts need guidance in what a proper jury instruction should

contain. Writs should be granted in this case to examine this problem and to resolve it.

In addition, in this case rumor was asserted as fact by a federal district court judge. As a result the plaintiffs Seventh Amendment and FELA rights to a fair jury trial were violated. False statements about the profession status of the treating physician of the plaintiff were present to the jury by the trial judge in this case as true. They were not. Both sides admit the stipulation was false. The question now is whether this stipulation so prejudiced the jury that the plaintiff did not get a fair trial under the Seventh Amemdment and FELA.

FACTS, LAW AND ARGUMENT: On the day of the accident the plaintiff was a service attendant aboard an Amtrack train. As the train passed through a construction site a collision occurred. The train hit a crane near the tracks which was working near an overpass which was under

construction. The impact caused extensive damage to the train and injured the plaintiff.

The plaintiff maintained that he had been seriously injured in that the accident caused the "bulging" disc in his neck which required surgery. The defendant, Boh Brothers, contended that although he might have been injured in the accident it was not a serious injury and did not require surgery. The jury resolved this question in favor of the defendant and awarded the plaintiff only $41,000.00 for a two level fusion.

(1) NEW TRIAL ON FELA CAUSATION AND DAMAGES

Around the turn of the century (1908) Congress enacted the Federal Employers' Liability Act (FELA) (45 USCA section 51 et seq.) This act was a congressional attempt to protect railroad workers who were being injured at an alarming rate in the

railroad industry.[2] In 1939 the act was strengthen by a number of amendments which eliminated a number of judicially created limitations on the act dealing with assumption of risk and coverage. As amended the act provided for liability on the part of a railroad employer for death or injuries caused "in whole or in part" by his negligence.[3]

Following the enactment of the statute this court stated that the test for causation in a FELA case was not that of proximate cause as that term is defined by traditional common law concepts of causation.[4] The test approved by this court was

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[2] See S Rep No. 460, 60th Cong, 1st Sess 3 where the Senate Committee which recommended passage stated that the general purpose of the act was to insure "the welfare of both employer and employee, by adjusting the losses and injuries inseparable from industry and commerce to the strength of those who in the nature of the case ought to share the burden."

[3] 45 USCA section 51

[4] See the cases of *Coray v. Southern Pacific Co.*, 335 U.S. 520, 93 L.Ed 208, 69 S.Ct. 275 (1949) and especially *Rogers v. Missouri Pacific R. Co.* 352 U.S. 500, 524, 559, 77 S.Ct. 443, 459, 478, 1 L.Ed.2d 493, 515, reh den 353 U.S. 943, 77 S.Ct. 808, 1 L.Ed. 2Ed

that of slight causation or where the acts of the defendant employer "played any part, even the slightest in producing the injury."[5]

Lower courts have often confused the concepts of negligence and causation. The blending of these two concepts into one has result in erroneous instructions being given to juries.[6] The lower courts need guidance in what a proper jury instruction should contain.

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764 (1975). It should be noted that neither these cases nor any other United States Supreme Court case directly treat the problem in the present case dealing with the proper jury instruction in a FELA case on the issue of causation. Both of these cases and the many that followed deal with the amount of evidence need to go the the jury in a FELA case. Hence there exists no United States Supreme Court case which decides the exact nature of causation in a FELA case.

5 *Rogers*, 352 U.S. 500, 524, 559, 77 S.Ct. 443, 459, 478, 1 L.Ed.2d 493, 515, reh den 353 U.S. 943, 77 S.Ct. 808, 1 L.Ed. 2Ed 764 (1975).

6 For an excellent discussion of this problem see 98 American Law Reports, Annotated pp. 639 to 683.

Both the Seventh Amendment and the Federal Employers' Liability Act (FELA) provide for jury trials in suits by an railroad employee against his employer for personal injuries. This court has effectively protected the railroad empolyee's right to a jury trial by reversing the granting of motions for directed verdict and/or JNOV.[7]

The jurisprudence has interpreted the congressional intent in enacting the FELA and the Jones Act was to secure to these injured workers jury determinations of factual issues in a larger proportion of cases and to a larger degree than would be true of other causes of actions tried in federal court.[8]

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[7] *Rogers v. Missouri P. R. CO.*, 352 US 500, 1 L ed 2d 493, 77 S Ct 443 (1957); *Tennant v. Peoria & P. U. R. Co.*, 321 US 29, 88 L ed 520, 64 S Ct 409 (1943); *Lavender v. Kurn*, 327 US 645, 90 L ed 916, 66 S Ct 7 ,(1946); *Ferguson v. Moore-McCormack Lines*,325 US 521, 1 L ed 511, 77 S Ct 457,(1957)

[8] *Boeing Company v. Shipman*, 411 F.2d 365, 5th Cir. (1969)

More importantly in this case the standard for FELA causation is a reduced standard of causation. If the trial court had denied the motion of Amtrack for a directed verdict the jury would have been instructed by the court on the reduced standard of FELA causation as well as stricter Louisiana Article 2315 proximate cause standard. With this instruction the jury could easily have connected up the injury caused by the accident and the disc fusions performed by Dr. Judice.

Federal Jury Practice and Instructions, Fourth Ed. Vol. 3 1987 section 80.18 defines "Proximate Cause" as

> "An injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case that the actor omission played an substantial part in bring about or actually causing the injury or damage, and that the injury or damage was either a direct

result of a reasonably probable consequence of the or omission." p.170

On the other hand "causation" in a FELA case is defined in Section 94.13 as:

"For the purposes of this action, injury or damage is said to be caused for contributed to by an act of failure to act when it appears from a preponderance of the evidence in the case that the act or omission played any part, no matter how small, in bringing about or actually causing the injury or damage. So if you should find from the evidence in the case that any negligence of the defendant contributed in any way toward any injury or damage suffered by the plaintiff, you may find that such injury or damage was caused by the defendant's act or omission." p.603

The thrust of this jury instruction is taken from the United States Supreme Court case of *Rogers v. Missouri Pacific Railroad Co.* 352 U.S. 500, 506, 77 S.CT. 443, 448, 1 L.ED.2D 443. In that case the Court reversed a judgment for the defendant and stated:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."[9]

In the Fifth Circuit case of *Page v. St. Louis Southwestern R. Co.* 312 F2D 84 (5th Cir. 1963) the court reversed the jury verdict in a FELA case because the trial court instructed the jury that:

> "The term proximate cause as used in this charge has a definite legal meaning

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9 *Rogers*, at 352 U.S. 500, 506, 77 S.CT. 443, 448, 1 L.ED.2D 443.

which may differ from your understanding of the meaning of that term as used in ordinary parlance.

"As used in this charge the term proximate cause' means that cause which in a natural and continuous sequence produced the event or happening in question and without which such event or happening would not have occurred; and the act or omission in question only becomes a proximate cause of an event or happening when such event or happening is the natural and probably(sic) consequence of such act or omission and is such a consequence as ought to have been foreseen by a person in the exercise of ordinary care in the light of attending circumstances. It need not be the sole cause, but it must be a concurring cause which contributedto the production of the result in question and but for which such

result or accident would not have occurred.'[10]

In the present case the trial judge gave an instruction on legal cause which is almost identical to that used in the court in *Page*. Judge Mentz instructed the jury that:

> 'Negligence is a 'legal cause' of damage if it directly and in natural and continuous sequence produces, or contributes **substantially** to producing such damage, so it can reasonably be said that, except for the negligence, the loss, injury or damage would not have occurred. Negligence may be a legal cause of damage even though it operates in combination with the act of another, some natural cause, or some other cause if such other cause occurs at the sametime as the

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10 *Page*, at p. 645

negligence and if the negligencecontributes **substantially** to producing such damage."

A comparison of the above quoted jury charges shows that they are very similar if not identical in content.

The jury charge given in this case instructed the jury that it had to find that the negligence of the defendant contributed "substantially" to the plaintiff's injury and that "except for the negligence" which must contribute "substantially" to the injury, the plaintiff would not have been injured. The repeated use of the word "substantially" caused the jury to not link up the accident, injury and disc herniation.

Assuming that the question of FELA liability had gone to the jury, it should have been instructed that, as to the FELA defendant, that if "...any negligence of the defendant contributed in any way toward any injury..." it should find for the plaintiff to the extent of that injury. This was not

done. The plaintiff was denied his constitutional and statutory right to a jury trial on both the issues of liability and damages.

(2)THE STIPULATION

Four years after the accident Dr. Judice did a two level fusion in the plaintiffs neck. The defense seized on this delay and used it as its main defense at trial. The linchpin of the plaintiff s case was the treating physician, Dr. judice. He was to testify live at the trial. He was to connect up the accident and the severe injury and the operation four years later. Plaintiff's counsel did not find out until the second day of trial that Dr. Judice would not be available to testify live. Counsel informed the court of this fact at which time Judge Mentz told counsel "Why he's in jail." Defense counsel told both the court and plaintiff's counsel that Dr. Judice had been charged with second degree murder for killing a patient on the operating table and that he had performed the operation in an intoxicated

condition.[11] Judge Mentz then ruled that the plaintiff could not use the deposition of Dr. Judice unless he enter into a stipulation which would inform the the jury that the doctor could no longer practice medicine in certain local hospitals and that he had been suspended from the practice of medicine in the State of Louisiana. Based on these representations by a federal district court judge plaintiff's counsel agreed to the stipulation only under threat of exclusion of the deposition.[12]

Events since the trial have proven that the information provided by Judge Mentz and defense

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[11] There is no suggestion in the record that these misrepresentations were intentional and petitioner makes no such representations in this writ.

[12] The stipulation read to the jury by the trial judge stated:

"It is stipulated and agreed that Doctor Donald Judice has left the State of Louisiana and will not be available in the trial of the case. He is no longer practicing medicine in the City of Houma, in Louisiana as a physician and his license to practice medicine has been suspended, nor is he any longer associated with the Terrebone General Hospital, the Thibodeaux General Hospital or the Lake View---Lake Wood Hospital of Morgan City, Louisiana."

counsel to be entirely false. However, the damage had been done. The jury returned a reduced verdict. Plaintiff's motion for a new trial was denied.

LAW AND ARGUMENT: A stipulation is like any other contract and is subject to general principles governing the construction of contracts.[13] While the general rule of law requires that the parties are bound by the facts to which they stipulate, certain exceptions exist. The parties are not bound by the stipulation in cases where to do so would result in manifest injustice or if the evidence contrary to the stipulation is substantial.[14] A stipulation/contract can not be considered as binding when based on incorrect information. In *United States v. Camp*, 723 F.2d 741, (9th Cir. 1984) the court remanded for the purpose of determining whether or not the

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[13] *Rice v. Glad*, 750 F. 2nd 434. (5th Cir. 1985)

[14] *Donovan v. Hamm's*, 661 F. 2nd 316, 317, (5th Cir. 1981)

stipulation should be voided when a stipulation was agreed upon based upon the incorrect representations made by a federal prosecutor. In *Camp* the court noted that appellants had every reason to rely on the factual representation made by a federal prosecutor".

Using general contract principles, plaintiff's counsel's consent was vitiated by a mistake of fact perpetuated by incorrect representations of fact by the trial judge.

Of course the "bottom line" is prejudicial effect. Assuming that it was error to read the stipulation to the jury the question remains as to whether it affected the jury's verdict. In considering this question this court should keep in mind the following: This is a FELA case. It was tried to a jury. The United States Supreme Court has indicated that the congressional intent in enacting the FELA was to secure to railroad workers jury determinations of factual issues in a larger proportion of cases and to a larger degree

than would be true of other causes of actions tried in federal court.[15] Perhaps most importantly in terms of the "realities of the courtroom"[16] the stipulation was read to the jury by the trial court judge. Clearly this added a judicial stamp of approval to its weight and effect on the jury. It is important to keep these points in mind when considering the effect of the stipulation on the jury verdict and plaintiff's substantial rights.

FRE 103 provides that the standard for reviewing a ruling which admits or excludes evidence is whether a substantial right was violated. It also provides that plain error which affects substantial rights may be considered on appeal even though an objection was not made at the trial level. The United States Supreme Court has defined "substantial error" as:

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15 *Boeing Company v. Shipman*, 411 F.2d 365, (5th Cir. 1969)

16 *Shows V. M/V Red Eagle*, 695 F.2d 114, at 119 (5th Cir. 1983)

> "If one can not say, with fair assurance,...that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected."[17]

Every case is different. What is a substantial error in one may not be in another. In other words, assuming there was error, even of a minor nature, did it affect the verdict **in this case**? If it did then the "substantial right" of the party to a fair trial and due process was violated and a new trial is necessary.

The issue of causation was central to this case. This is the only point which the defense strongly disputed. The evidence taken as a whole was in the plaintiff's favor on this point and the jury's finding of no causation was the result of the error committed in the admission of the

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[17] *Kotteakos v. United States*, 328 U.S. 750, at 765, 66 S.Ct. 1239, at 1248, 90 L.Ed. 1557 (1946)

stipulation. It was extremely prejudicial for the jury to hear from the trial judge that plaintiff's principal medical witness had lost his right to practice medicine in the State of Louisiana.

The undersigned does not suggest that the trial judge intentionally misrepresented the facts. This is a case where rumor was asserted as fact. A serious mistake was committed. As a result, the jury returned a grossly reduced award. The effect of telling the jury that the operating physician was not allowed to practice medicine in Louisiana and that his license had been suspended when in fact this was false denied plaintiff his right to a fair jury trial on the issue of causation as provided by the Seventh Amendment to the United States Constitution and FELA.

CONCLUSION

This court should seek to protect and insure to railroad workers a fair determination of the only

right they have to compensation for their injuries. The granting of this writ and the reversal of the court of appeals and the ordering of a new trial on FELA causation will preserve to railroad workers their right to a trial by jury on all issues including the proper standard on causation.

By Counsel:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading had been served on all counsel of record by placing a copy of same in United States mail, postage prepaid on this 24th day of Jan., 1989.

ALLEN J. BORNE

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 86-3876

RICHARD PRELL, PLAINTIFF,

versus

NATIONAL RAILROAD PASSENGER
CORP., d/b/a AMTRAK, BOH BROS.
CONSTRUCTION CO., INC., and
XYZ INSURANCE COMPANY DEFENDANTS.

****

CALVIN BRENT, JR. PLAINTIFF-APPELLANT,

versus

NATIONAL RAILROAD PASSENGER
CORP., d/b/a AMTRAK & BOH BROS.
CONSTRUCTION CO., INC. DEFENDANT-APPELLEES.

consolidated with

86-3887

RICHARD PRELL, PLAINTIFF,

versus

NATIONAL RAILROAD PASSENGER CORP., d/b/a AMTRAK, ET AL, THIRD-PARTY PLAINTIFF-APPELLEE

versus

NORTH RIVER INSURANCE CO., ET AL THIRD PARTY DEFENDANTS-APPELLANTS

****

CALVIN BRENT, JR. PLAINTIFF

versus

NATIONAL RAILROAD PASSENGER CORP., d/b/a AMTRAK, ET AL., THIRD PARTY PLAINTIFF-APPELLEE,

versus

THE NORTH RIVER INSURANCE CO., THIRD-PARTY DEFENDANT-APPELLANT

Appeals from the United States District Court
for the Eastern District of Louisiana
(CA 83-3686 I & CA 83-4520 I)

(September 29, 1988)

Before WISDOM, REAVLEY and POLITZ, Circuit Judges.

POLITZ, Circuit Judge. *

Calvin Brent, Jr. filed suit against the National Railroad Passenger Corporation (Amtrak) and Boh Brothers Construction Company, Inc., for personal injuries sustained when an Amtrak train collided with a Boh Brothers crane. The jury found Boh Brothers negligent and awarded Brent $41,000.00. Brent's motion for judgment n.o.v. or new trial was denied and he appeals. In the consolidated case Amtrak's insurers,

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

North River Insurance Company, United States Fire Insurance Company, and International Surplus Lines Insurance Company, appeal the summary judgment in favor of Amtrak on the issue of policy coverage. We affirm all of the challenged district court rulings, except for its directed verdict against Brent on the issue of Amtrak's liability under the Federal Employer's Liability Act (FELA), 45, U.S.C. Sect. 51 et seq, and remand for entry of an appropriate judgment.

Background

On September 13, 1982 an Amtrak train collided with a Boh Brothers crane at a construction site in New Orleans. Brent, an Amtrak employee aboard the train, filed an FELA suit against Amtrak[1], and,

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1 Richard Prell, also an Amtrak employee, sued Amtrak and Boh Brothers for his injuries. The suits were consolidated for trial.

invoking pendent jurisdiction, a negligence suit against Boh Brothers. Amtrak filed a cross claim against Boh Brothers for indemnification of any sums for which it might be held account-able.

Amtrak filed a third-party complaint against its insurers, seeking protection against any judgment and the costs of defense. The district court granted the insurer's pretrial motion for summary judgment, holding that the policies provided no coverage. After trial, the court reconsidered that ruling and held that the policies did provide coverage and that the insurers owed Amtrak the costs of defense.

The district court directed a verdict in favor of Amtrak on Brent's liability claim and the case went to the jury on the issue of Boh Brothers' negligence. Causation was seriously disputed. Following the accident Brent was examined and treated by several doctors, but it was not until three years and four months later that he underwent surgery for a herniated disc. The

surgery was performed by Dr. Donald Judice. Brent maintained that his back condition was caused by the collision between the train and the crane. Boh Brothers vigorously contended that the herniated disc condition was not causally related to the accident.

The trial began on Monday, March 17, 1986. On the second day of trial counsel for Brent informed the court in chambers that Dr. Judice would not be present to testify.[2] The trial judge responded that it was his understanding that Dr. Judice was in jail. Counsel for Boh Brothers added that he had been told that the doctor had been charged with second degree murder because a

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2 In a post-trial affidavit, Brent's attorney related repeated unsuccessful attempts to contact Dr. Judice. He stated that a few days before trial he served a subpoena on Dr. Judice's receptionist, but the return on that subpoena is not in the appellate record. Counsel also attested that the night before the trial began he finally reached Dr. Judice who informed counsel that he would be "in transition." Counsel offered to accommodate the doctor's schedule in taking his testimony, but heard nothing further from him.

patient died during an operation the doctor performed while intoxicated.

Brent requested permission to read Dr. Judice's deposition to the jury in lieu of his testimony. Boh Brothers objected. After further discussion the parties agreed that the deposition could be used and Dr. Judice's curriculum vitae could be read to the jury, but only pursuant to a stipulation[3] that the doctor had been suspended from practice and had left the state. Court was in recess on Wednesday, March 19, 1986, and Brent's counsel had an opportunity to verify the

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3 The stipulation declared:

> It is stipulated and agreed that Doctor Donald Judice has left the State of Louisiana and will not be available in the trial of the case. He is no longer practicing medicine in the City of Houma in Louisiana as a physician and his license to practice medicine has been suspended, nor is he any longer associated with the Terrebonne General Hospital, The Thibodaux General Hospital or the Lake View -- Lake Wood General Hospital of Morgan City, Louisiana.

information pertaining to Dr. Judice. Insofar as the record before us reflects, he made no effort to do so. On the following day, Thursday, March 20, 1986, the stipulation, vitae, and deposition were read to the jury.

Dr. Judice's deposition had been given prior to the surgery. He described Brent's back condition but he does not refer, even inferentially, to the cause of the condition or the part the accident may have played therein. Dr. Judice's testimony is of no aid whatsoever in the resolution of the causation inquiry.

In closing argument Brent asked for damages of $450,000.00. Boh Brothers suggested the adequacy of $13,000. The jury returned a verdict of $41,000 against Boh Brothers. Brent's post-trial motion contended that the stipulation was incorrect, the damage award was inadequate, and the directed verdict in favor of Amtrak was entered in error. The motion was rejected; Brent

appeals. The court awarded Amtrak the costs of defense; Amtrak's insurers appeal.

Analysis

1. The stipulation

Brent maintains that the stipulation was incorrect,[4] his attorney agreed to it under duress, and its admission violated his right to a fair trial.

A party is bound by a stipulation freely and fairly joined unless the evidence contrary to the stipulation is substantial or manifest injustice is shown. **Hymel v. Commissioner of Internal Revenue,** 794 F.2d 939 (5th Cir., 1986); **Donovan v. Hamm's Drive Inn,** 661 F.2d 316 (5th Cir. Unit A 1981); **Loftin and Woodard, Inc., v. United**

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[4] In an affidavit filed in conjunction with post-trial motions Dr. Judice stated that he had never has his license to practice medicine in Louisiana suspended, his association with his home area hospitals had not been interrupted, and at the time of Brent's trial he was outside of the State of Louisiana and more than 100 miles from the courthouse.

States, 577 F.2d 1206 (5th Cir. 1978). Assuming per arguendo, that the stipulation was incorrect, Brent is entitled to no relief. Prior to entering into the stipulation on Tuesday, March 18, 1986, counsel for Brent made no effort to verify the information. During the day-long recess the next day no effort was made to check on the doctor. On Thursday, the day the stipulation was used, and on Friday, the final day of trial, there was neight a challenge nor an attempt to correct the stipulation. There is no evidence whatever in the trial record contrary to the stipulation. Further, we are not prepared to find manifest injustice in holding a party to a stipulation for which his attorney knowingly bargained but failed to verify even though he had adequate opportunity and occasion to do so.

Even were we to conclude that the stipulation should not have been admitted, Brent would not be entitled to a new trial. The critical jury issue was causation. Neither the crediting nor

discrediting of Dr. Judice's testimony would be relevant to that issue, for Dr. Judice did not address that issue in his deposition.

2. Adequacy of damage award

Brent's challenge to the damage award is without merit. A jury has broad discretion in awarding personal injury damages. **Book v. Nordrill, Inc.**, 826 F.2d 1457 (5th Cir. 1987). If there is a reasonable basis for the verdict we are not wont to disturb it. See **Bailey v. Southern Pacific Transportation Co.**, 613 F.2d 1385 (5th Cir.), cert. denied, 449 U.S. 836 (1980). Moreover, we will not reverse the denial of a motion for judgment n.o.v. or new trial which is based on a claim of inadequate damages unless there is a clear abuse of discretion. **Book**, 826 F.2d at 1462 (citing **Young v. City of New Orleans**, 751 F.2d 794 (5th Cir. 1985)).

Conflicting testimony about the nature, extent, and cause of Brent's injuries was presented.

It was the jury's prerogative to resolve those conflicts. Brent concedes that the jury resolved the causation issue in favor of Boh Brothers. Accordingly, the award was not intended to compensate for the disc operation and resulting income lossd. There is no error inherent in his damage award.

3. Directed verdict in FELA claim

The trial court may grant a directed verdict in favor of a defendant in an FELA action only if there are no probative facts supporting the plaintiff's position. See **Lavender v. Kurn**, 327 U.S. 645 (1946); **Nix v. Kansas City Southern Ry.**, 776 F.2d 510 (5th Cir. 1985). We agree with Brent that in applying this standard the district court should not have granted Amtrak's motion for a directed verdict.

Although evidence of Amtrak's negligence was far from overwhelming, there was testimony that the engineer failed to blow the train's whistle to signal its approach to the construction site. In

addition, there was evidence suggesting that the train traveled through the construction area at an excessive speed. Because there were at least some probative facts supporting Brent's position, his claim should have gone to the jury.

Our conclusion that the trial court erred in directing a verdict in favor of Amtrak on the FELA claim does not require a remand because of the posture of this case. Brent has a judgment against Boh Brothers for the entirety of his losses, including damages recoverable under the FELA. When the Boh Brothers judgment is paid, the FELA claim against Amtrak becomes moot. During oral argument counsel for Boh Brothers informed the court that promptly upon affirmance the judgment would be paid. When that is done, the court may enter a judgment decreeing that the FELA claim is rendered moot. If payment is not made, the trial court must reinstate the FELA claim and there must be a retrial on that issue and on Amtrak's complaint for judgment over against Boh Brothers.

4. Amtrak's insurance coverage

Louisiana law directs that the determination whether an insurer is obligated to defend an insured is made by looking "exclusively to the pleadings in light of the contract provisions; the ultimate outcome of the case has no effect upon the duty to defend." **Sullen v. Missouri Pacific R.R.**, 750 F.2d 428, 433 (5th Cir. 198). Moreover, Louisiana law provides that in construing an insurance policy, any ambiguity is to be construed against the insurer, and in favor of what reason and probability dictate was intended by the parties with respect to coverage. **Benton Casing Service, Inc., v. Avemco Insurance Co.**, 379 S0,2d 225 (La. 1979).

The policy provision in dispute between Amtrak and its insurers provides:

> Coverage A - Bodily Injury Liability
>
> To pay on behalf of the Insured all sums which the insured shall become

> legally obligated to pay as damages because of bodily injury, sickness, or disease, including death at any time resulting therefrom, ... (1) sustained by any person arising out of acts or omissions at the designated job site which are related to or are in connection with the work described in Item 6 of the Declarations...[5]

The complaints against Amtrak alleged negligence is failing to provide a safe place to work, failing to operate the train in a safe manner, and failing to warn. Amtrak's insurers argue that the policy provision does not provide coverage because the negligence ascribed to Amtrak has no relationship to the work that was being performed at the construction site. We disagree. Amtrak was sued for injuries that allegedly arose from negligent acts or omissions, such as speeding and failing to sound the train whistle, that occurred <u>at the construction site.</u> Thus, the basis for Amtrak's liability was directly related to the work being

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5 The "work described in Item 6 of the Declarations" is the work site where the train and crane collided.

performed there. But for the presence of the crane at the site, the accident would not have occurred. The district court did not err in awarding Amtrak the costs of its defense.

The judgment denying Brent's motion for judgment notwithstanding the verdict or a new trial is AFFIRMED. The judgment in favor of Amtrak against Brent is VACATED and Brent's FELA claim is REMANDED for entry of an appropriate judgment consistent with this opinion. The judgment in favor of Amtrak against its insurers is AFFIRMED.

"APPENDIX B"

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 86-3887

RICHARD PRELL,

Plaintiff,

versus

NATIONAL RAILROAD PASSENGER CORPORATION D/B/A AMTRAK, ET AL.,

Third Party Plaintiff-Appellees,

versus

NORTH RIVER INSURANCE CO., ET AL.,

Third Party Defendants-Appellants.

****

CALVIN BRENT, JR.,

Plaintiff

versus

NATIONAL RAILROAD PASSENGER CORPORATION d/b/a AMTRAK, ET AL.,

Third Party Plaintiff-Appellee,

versus

THE NORTH RIVER INSURANCE COMPANY,

Third Party Defendant-Appellant.

Appeal from the United States District Court
for the
Eastern District of Louisiana

ON PETITION FOR REHEARING
(October 31, 1988)

Before WISDOM, REAVLEY and POLITZ,
Circuit judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT;

HENRY A. POLITZ
United States Circuit Judge